

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

**IN RE: INCRETIN-BASED  
THERAPIES PRODUCTS  
LIABILITY LITIGATION**

**Relates to: ALL CASES**

**MDL No. 13-md-2452-AJB(MDD)**

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO SEAL**

Hon. Anthony Battaglia

**I. INTRODUCTION**

The parties' expert reports were filed on the docket because filing was required by the agreed-upon scheduling order. Dkt. 809 p. 1. Defendants now seek to have the expert reports of Dr. Fleming and Dr. Madigan sealed or stricken from the docket. Their motion papers suggest they may also try to challenge Plaintiffs' FDA expert, Dr. Fleming. Plaintiffs respond as follows.

**II. PLAINTIFFS DO NOT OBJECT TO THE REDACTIONS PROPOSED BY  
DEFENDANTS, BUT RESERVE THEIR RIGHT TO OPPOSE ALL REDACTIONS  
ONCE DISPOSITIVE MOTIONS ARE FILED**

Defendants appear to have made their proposed redactions under the "good cause" standard as applied by this Court in its prior orders. Plaintiffs do not agree that Defendants can meet the "good cause" standard here, but in light of the Court's earlier rulings, they do not object to the proposed redactions. Plaintiffs reserve their right to oppose *all* redactions once dispositive motions are filed, when the much more stringent "compelling reasons" standard will apply.<sup>1</sup>

**III. THE MOTION TO STRIKE SHOULD BE DENIED**

Defendants' motion to strike Plaintiffs' expert reports has been mooted by their decision to partially redact and publicly file Plaintiffs' reports themselves. See Dkt. 882-

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<sup>1</sup> It is well-settled that "[a] strong presumption of access to judicial records applies fully to dispositive pleadings *and their attachments*," such that the party seeking to seal must meet the "compelling reasons" standard. *Algarin v. Maybelline, LLC*, 2014 WL 690410, at \*2 (S.D. Cal. Feb. 21, 2014) (Battaglia, J.) (emphasis added).

3, pp. 26-158 (Dr. Fleming) and Dkt. 882-3, pp. 4-24 (Dr. Madigan). The reports are not problematic as currently filed, redacted by Defendants' own hand. Striking those reports would leave only Defendants' report on the docket, giving the public an imbalanced version of the facts in a case with significant public health implications.

#### **IV. DR. FLEMING IS A PROPER – AND PREEMINENT – EXPERT WITNESS**

Industry consultants and former employees routinely serve as litigation experts, testifying on behalf of parties bringing claims against companies for which they used to work. There is no dispute that Plaintiffs' FDA expert, Dr. Fleming, had previously served as a consultant for Defendants Lilly, Amylin and Novo, as well as many other companies. See Dr. Fleming's Report, attached to Dkt. 882-3, Exh. B., pp. 3-4. However, Defendants now suggest that Dr. Fleming may have unspecified "confidential information," which may be subject to unspecified "nondisclosure agreements," and that he may be a "competitor" who should not receive confidential documents. Dkt. 882, pp. 1, 2, and 4.

A meet and confer was held on January 12, 2015 to obtain more information about these allegations. Defendants have now agreed to produce the "nondisclosure agreements," although that has not yet occurred. Defendants have refused to identify what, if any, allegedly confidential information was set forth in Dr. Fleming's report. To the extent these matters have been further refined by way of the "meet and confer" process, Plaintiffs briefly note the following:

- Waiver: Defendants expressed no concern at all about Dr. Fleming's involvement in this case when he was disclosed as Plaintiffs' FDA expert on November 24, 2014, or three weeks later when his report was filed on December 15, 2014. Only a week *after* his report was served did Defendants begin their attacks on Dr. Fleming. Defendants knew exactly who he was from the start, and should have challenged him at the time of disclosure if they were going to challenge him at all.<sup>2</sup>

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<sup>2</sup> Dr. Fleming is a leading authority on diabetes medications. It is no exaggeration to say he may be the single best qualified person in the world to testify about *what the FDA has done* with regard to the incretins and *what the FDA would do* if a manufacturer chose to inform the medical community and consumers about the risks of pancreatic cancer.

- Confidentiality: Despite Plaintiffs' requests for supporting evidence, Defendants still have not identified any alleged item of "confidential information" in Dr. Fleming's report, and still have not provided copies of a single claimed "nondisclosure agreement."<sup>3</sup>
- Competitor: Defendants referred to Dr. Fleming as a "competitor," referencing the Protective Order. However, they have provided no facts to support his status as a "competitor," the definition of which was collectively negotiated by all of the Defendants as part of the Protective Order. Dkt. 564 at para 5(d)(b).

Dr. Fleming is a preeminent expert on the diabetes medications at issue here, and was properly named as an expert witness in this case.

## V. CONCLUSION

Plaintiffs do not object to Defendants' proposed redactions at this time, but reserve their right to challenge those redactions once dispositive motions are filed.

DATED: January 13, 2015

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<sup>3</sup> **"Unlike attorney-client communications, discussions between parties or counsel and experts do not carry the presumption that confidential information was exchanged. Because the burden is on the party seeking to disqualify the expert, that party should point to specific and unambiguous disclosures that if revealed would prejudice the party."** *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004) (emphasis added; citations omitted). As the Court may have already observed, Dr. Fleming's report is based entirely upon documents produced in discovery and publicly-available scientific evidence. It is difficult to see, even in theory, what "confidential information" Dr. Fleming *could* possess which would not have been part of the general causation and preemption discovery in this case.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 13, 2015, I caused the above document to be filed via the CM/ECF system for the Southern District of California, and the CM/ECF system served the same upon all registered users at their registered email addresses.

s/\_\_\_\_\_  
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